

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6200

ORIGINAL
WITH PROOF
OF SERVICE

3-10
To be argued by
PAUL LEWIS

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



Justin F. Latona, d/b/a J.F. Latona Construction Co., Inc.,

v.

G-Lam Corp., The Committee for Economic Improvement of Essex County, Inc. (CEI),
the People of the State of New York and U.S. Community Services Administration (CSA)
formerly known as the Committee of Economic Opportunity,

Plaintiff,
Defendants.

U.S. Community Services Administration,

Defendant-Appellee,

v.

G-Lam Corporation,

Defendant-Third-party Plaintiff-Appellant.

G-Lam Corporation,

Plaintiff,

v.

International Telephone & Telegraph Corporation, Town of North Elba, New York and
Robert Brodsky,

Defendants.

On Appeal from a Judgment of the United States District
Court for the Northern District of New York

REPLY BRIEF FOR DEFENDANT-
THIRD-PARTY PLAINTIFF-APPELLANT

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Preliminary

The Government has done nothing but raise red herrings in response to appellant G-Lam's brief.

First, it contends that G-Lam has not stated a cause of action under the Tucker Act. While it admits that G-Lam has a right to sue as a third-party beneficiary of a government-grantee contract (a right Trial Judge Foley erroneously refused to even acknowledge existed), it now astonishingly claims that G-Lam never asserted such a breach. The statement is clearly erroneous and flatly in contradiction to the facts.

Second, the Government asserts that G-Lam has no independent right of action against the Government under 5 U.S.C. §701 et. seq. because those sections do not provide a jurisdictional foundation for such claim, citing Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980 (1977). But Califano didn't eradicate the right of a party to sue under 5 U.S.C. §701 et. seq. The Califano decision was completely premised on the fact that in 1976, 28 U.S.C. §1331--the "federal question" statute--was amended to eliminate the \$10,000 jurisdictional amount, thereby expanding the application of this statute. Califano merely holds that the general judicial review statute for agency action is 28 U.S.C. §1331, and not the APA. G-Lam has every right to bring this

action under 28 U.S.C. §1331.

The Government also swipes at G-Lam's standing to sue for "agency action." But Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361 (1972) held unequivocally that it has "long been recognized" that parties have standing where there are palpable economic injuries suffered as a result of agency action.

I.

G-Lam Has Stated A Cause of Action
Against the United States Under the
Tucker Act (28 U.S.C. §§1346 & 1491)

The Government's brief, as did the Court below, completely misses the point that G-Lam made in its brief. The Government is constantly referring to the fact that G-Lam is not in privity of contract with the U.S. and that G-Lam's contract with CEI does not provide G-Lam with enforceable rights against the U.S. But G-Lam's contention is that the contract between CSA and CEI may provide G-Lam with rights that it can enforce directly against the U.S.

Although the Court below didn't even recognize the right of persons or parties to sue as a third-party beneficiary of Government contracts with grantees, the Government admits, as it must, that Hebah v. United States, 428 F. 2d 1334 (Ct. Cl., 1970) and Housing Corporation of America v. United States, 468 F. 2d 922 (Ct. Cl., 1972) hold that a third-party beneficiary does have a cause of action against the U.S. where the U.S. breaches its contract with its grantee (appellee's brief, p. 5). But to dodge this irrebuttable law, the Government incredibly states that G-Lam has never alleged such a breach.

The statement is incredible. The fact of the matter is that G-Lam has been making this allegation consistently throughout the course of this litigation. See G-Lam's answer, counterclaim, cross-claim and third-party claim, appx. 20a; G-Lam's amended answer, et. al., appx. 46a; and G-Lam's brief, p. 12.

The Government relies on U.S. v. Orleans, 425 U.S. 807 (1976) for the proposition that a community action agency is not an agent of the U.S. merely because it is a grantee of federal funds. This principle, however, is completely irrelevant to the case at bar. G-Lam is not basing its claim on any agency theory. G-Lam's contention is, and always has been, that its claim against the U.S. derives from the contract between the local entity (CEI) and the U.S., a position which has been long upheld by the Courts, see Maneely v. U.S., 68 Ct. Cl. 629 (1929); U.S. v. Huff, 165 F. 2d 720 (5th cir., 1948); Deltec Corp. v. U.S., 326 F. 2d 1004 (Ct. Cl., 1964); Hebah v. U.S., supra.

The Government also places great reliance on Housing Corporation of America, supra, but that case is fundamentally different from the one at bar. There, the plaintiff was relying upon its contract with the grantee, while G-Lam is relying on the contract between the local agency (CEI) and the

U.S. Also, the plaintiff in Housing Corp. of Am. had been paid all of the moneys that were due to him under his contract, but made a claim for unapproved changes for additional work. G-Lam, however, is making its claim for approved work which has been completed and certified, but for which it has not been paid, and alleges that the Government's breach and abandonment of its contract with CEI is the cause of G-Lam's failure to receive payment.

The Government tries to distinguish the cases cited by G-Lam by stating that they did not deal with a federal agency/grantee situation, but instead involved a situation where the U.S. had a contract with a party who then subcontracted with the third party (appellee's brief, p. 6). Whether formally designated as a contract or not, there are written documents which define the relationship between the agency and the grantee and which set forth the terms and conditions of the grant. These documents are certainly contractual in nature, and should be considered as such for purposes of the Tucker Act. In fact, the Comptroller General of the U.S. has stated:

"The acceptance of the grant creates a contract between the United States and the grantee under which the moneys paid over to the grantees, while assets in the hands of the grantee, are charged with the

obligation to be used for the purposes
and subject to the conditions of the
grant." (42 Comp. Gen. 289, 294 (1964))

The Supreme Court has recently held that in order to state a claim under the Tucker Act, all that the plaintiff need do is allege the existence of a contract and the Government's breach of that contract, U.S. v. Hopkins, 427 U.S. 123, 130 (1976). This is exactly what G-Lam has done, and all that G-Lam was able to do at this early stage of the proceedings.

Determining exactly what rights G-Lam might have under CSA's contract with CEI or any other rights that G-Lam may have against the U.S. will depend on full disclosure by the U.S. of its contractual relationship with CEI and its course of dealing with G-Lam. These facts were not before the Court below. Accordingly, the District Court erred in ruling that G-Lam did not state a claim under the Tucker Act.

II.

G-Lam Has Stated A Cause of Action for Judicial Review of Agency Action

The Government's brief correctly points out that the Supreme Court has recently held that the Administrative Procedures Act, 5 U.S.C. §701 et. seq. (hereinafter APA), is not an independent jurisdictional statute, Califano v. Sanders, 430 U.S. 99, supra. But in so doing, the Court did not restrict the power of the Federal Courts to review agency action; it merely held that such power is conferred by 28 U.S.C. §1331 rather than the APA.

The Court in Califano predicated its decision on an amendment to 28 U.S.C. §1331, which eliminated the \$10,000 amount in controversy requirement in actions against the United States, or its agencies and employees. Prior to the amendment, agency action which affected less than \$10,000 was not subject to judicial review under 28 U.S.C. §1331. Since this was inconsistent with the Supreme Court's holding in Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507 (1967) that all agency action is subject to judicial review unless a statute specifically and unequivocally precludes review, the APA was utilized to plug the gap. With the amendment to 28 U.S.C.

§1331, however, this interpretation of the APA is no longer necessary, and as a result, the Court concluded that:

"The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action..."
(97 S. Ct. at 984)

The Courts which have examined the issue subsequent to Califano v. Sanders, supra are unanimous in holding that that decision was formalistic only, and had no substantive effect on judicial review proceedings, see, e.g., Harary v. Blumenthal, 555 F. 2d 1113, 1115 (2d cir., 1977); Fort Sumter Tours, Inc. v. Andrus, 564 F. 2d 1119, 1123 (4th cir., 1977); Clark v. Richardson, 431 F. Supp. 105, 109-110 (D. N.J., 1977); Atchinson, Topeka & Santa Fe Railway Co. v. Callaway, 431 F. Supp. 727, 729 (D. D.C., 1977).

Obviously, the fact that the APA is no longer a jurisdictional statute does not eliminate it from the picture. The APA continues to regulate the substantive aspects of judicial review actions. In cases decided subsequent to Califano v. Sanders, it has been held that the APA defines the standard for determining the ripeness of judicial review, Fort Sumter Tours,

Inc. v. Andrus, supra; provides the scope of review of agency action, Mid-Atlantic Nephrology Center, Ltd. v. Califano, 433 F. Supp. 23, 31 (D. Md., 1977); and confers standing on the parties seeking the review, Acosta v. Gaffney, 558 F. 2d 1153, 1156-57 (3d cir., 1977); Atchinson, Topeka, etc. v. Callaway, supra; and Clark v. Richardson, supra.

The Government next challenges G-Lam's standing to seek judicial review (appellee's brief, p. 9). However, Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361 (1972), the case on which it relies, supports G-Lam's position. The Court therein stated:

"These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." (405 U.S. at 733-34, 92 S. Ct. at 1365)

G-Lam is claiming that as a result of the suspension and/or termination of funding of the bobsled run project by the U.S., it has not been paid a \$100,000 progress payment for work certified as completed, has suffered lost profits, and has lost the opportunity to bid on and undertake other projects

at the Lake Placid Olympic site. Unquestionably, these are the types of injuries which are sufficient to confer standing under the standards set forth in Sierra Club, supra, Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827 and Barlow v. Collins, 397 U.S. 159, 90 S. Ct. 832.

The Government has attempted to becloud the issues presented by this appeal by claiming that the District Court lacks jurisdiction to review the actions of CSA and/or that G-Lam lacks standing to seek review of those actions. The real issues are whether G-Lam has stated a cause of action for judicial review of agency action, or if it has not, whether G-Lam's reply memorandum (pp. 63a-76a) should have been treated by the Court below as a motion to amend.

The Federal Courts have long rejected the mechanistic view of pleading which the Government urges on the Court. Pleadings are to be liberally construed and ambiguities must be resolved in favor of the pleading, Friends of the Earth v. Carey, 535 F. 2d 165, 176 (2d cir., 1976); International Controls Corp. v. Vesco, 490 F. 2d 1334, 1351 (2d cir., 1974) cert. den. 417 U.S. 932, 94 S. Ct. 2644 (1974). Accordingly, Courts are not bound by the bare statements of the pleading. As this Court has stated:

"When the complaint pleads facts from which federal jurisdiction may be inferred, however, the insufficiency of the jurisdictional allegation is not controlling, and the action need not be dismissed." (Harrary v. Blumenthal, 535 F. 2d at 1115)

It is true that G-Lam's pleadings do not use the catchwords "agency action". But it is undisputed that CSA was funding the bobsled-run project and in its original and proposed amended pleadings (pp. 20a, 46a and 47a), G-Lam has expressly alleged that CSA, among others, had refused to pay G-Lam the monies which were then due and owing to it. These allegations thus allude to agency action in fact, and a liberal reading of them should have led to the conclusion that G-Lam was seeking to have the agency action reviewed. This is especially so in light of the fact that in its reply memorandum (pp. 63a-76a), G-Lam specifically argued that it should be entitled to judicial review of the agency action.

Alternatively, the Court below could have treated G-Lam's reply memorandum as a motion to amend. Various proceedings have often been treated by the Courts as a motion to amend even though not formally designated as such, Roloff v. Arabian American Oil Co., 421 F. 2d 240 (2d cir., 1970); International Brewers, Inc. v. Swed Distributing Co., 351 F. 2d

455 (5th cir., 1964); Tron v. Condello, 427 F. Supp. 1175 (S.D. N.Y., 1976).

The Government makes much of the fact that G-Lam never formally requested that it be permitted to amend its pleading. However, when G-Lam filed its reply memorandum, a motion to dismiss by the Government was pending before the Court and its decision was imminent. It was G-Lam's belief that the reply memorandum was the quickest and most efficient way to bring the judicial review issue to the attention of the Court before it rendered its decision on the Government's motion to dismiss.

The issues raised in the reply memorandum are substantial, and were interposed when the litigation was still at an early stage. At the very least, G-Lam should have been permitted the opportunity to make a motion to amend so that it would be able to perfect its pleading.

Finally, the Government argues that Warner v. Cox, 487 F. 2d 1301 (5th cir., 1974) and International Engineering Co. v. Richardson, 412 F. 2d 573 (D.C. cir., 1975) preclude judicial review of the agency action herein. The Government relies on these two cases for the proposition that G-Lam's exclusive

remedy lies in a Tucker Act suit in the Court of Claims. But then the Government also argues that the Court of Claims lacks jurisdiction to hear G-Lam's claims. In other words, the Government is attempting to insulate its actions from any judicial scrutiny whatsoever, even though those actions have damaged G-Lam severely, and perhaps irreparably.

In fact, Warner v. Cox and International Engineering are distinguishable. Both decisions were predicated on a finding that the Court of Claims had jurisdiction over the claims of the plaintiffs therein, thus those plaintiffs had another "adequate remedy". In the case at bar, it is still unclear whether G-Lam has any remedy in the Court of Claims. If, as the Government argues, the Court of Claims does lack jurisdiction over G-Lam's action, then G-Lam certainly should be free to pursue the judicial review proceeding. On the other hand, if jurisdiction does lie in the Court of Claims, then according to Warner and International Engineering, G-Lam would be precluded from pursuing the judicial review proceeding.

With the jurisdictional issue up in the air, it was necessary for G-Lam to pursue both remedies simultaneously, at least until such time that it became certain that one path would be completely foreclosed. G-Lam was merely being

vigilant in protecting all of the rights that it may have, and did not want to be subject to the defense that it delayed seeking the vindication of one right, or waived that right, while it was pursuing another.

Conclusion

For the foregoing reasons, it is respectfully requested that the decision below be reversed with respect to the third-party beneficiary basis of that decision; and that G-Lam be granted leave to file an amended complaint, or in the alternative, leave to file a motion to amend its complaint.

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss..

ROBERT LA GRASSA, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 62-20 60' RD
MASPETH, N.Y.

That on the 10 day of MARCH, 1978,
deponent personally served the within REPLY BRIEF FOR
DEPENDANT-THIRD PARTY PLAINTIFF-APPELLANT
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving _____ true copies of same with a duly
authorized person at their designated office.~~

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

PAUL V. FRENCH ESQ.
UNITED STATES ATTORNEY
ATTORNEY FOR DEFENDANT-APPELLEE
U.S. POST OFFICE AND COURTHOUSE
ALBANY, N.Y. 12207

Sworn to before me this

10 day of March, 1978

Robert La Grassa

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-030908
Qualified in Queens County
Commission Expires March 30, 1979